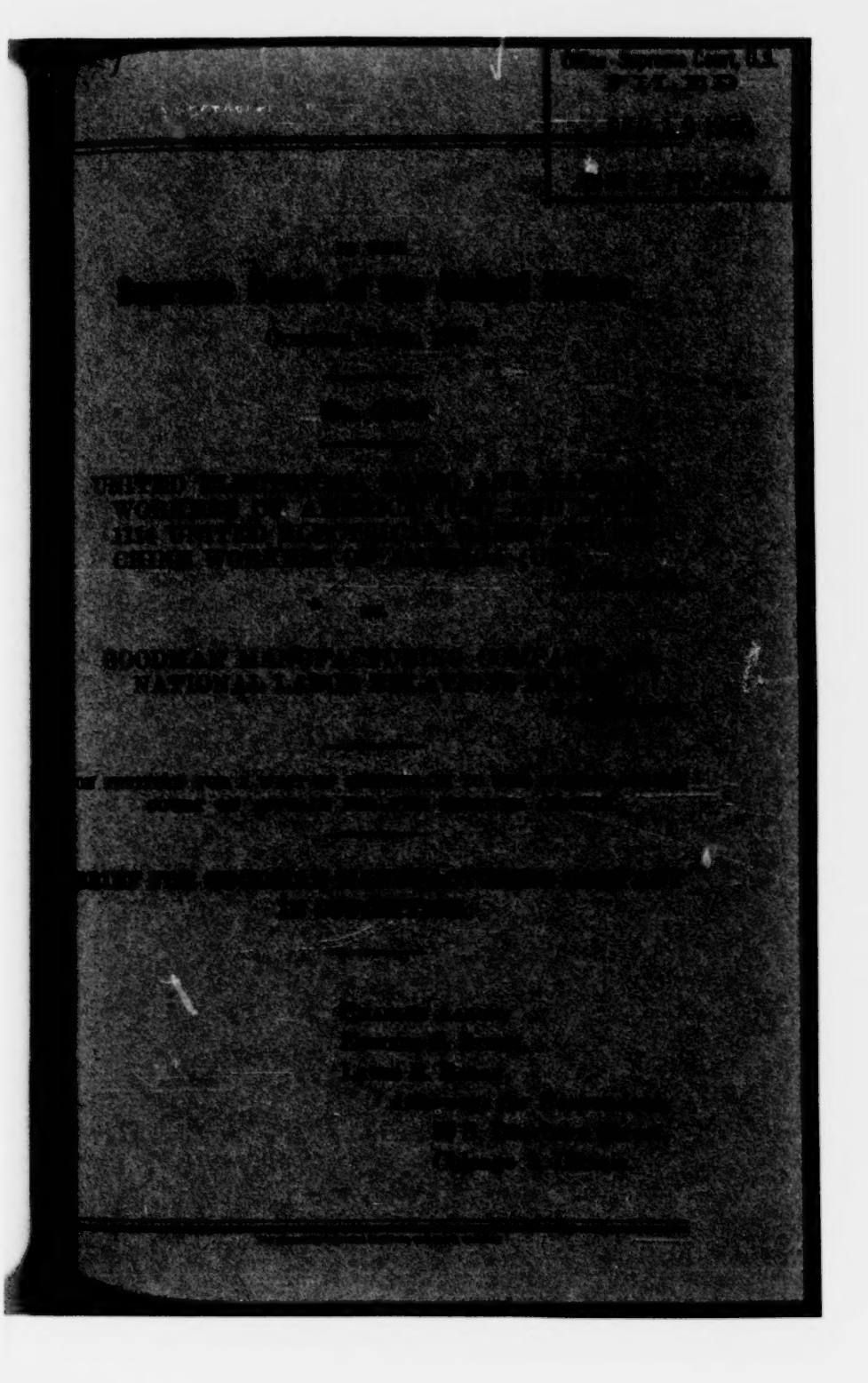

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 233.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) AND LOCAL 1114 UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
Petitioners,

vs.

GOODMAN MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR GOODMAN MANUFACTURING COMPANY IN OPPOSITION.

OPINIONS BELOW.

The first opinion of the court below (Pet., App. B, p. 22) is reported at 227 F. 2d 465; its second opinion (Pet., App. B, p. 30) is reported at 234 F. 2d 775. Neither the order of the court below denying petitioners' motion for leave to intervene in the review proceedings (Pet., App. A, p. 21) nor the order of the court below denying petitioners' motion for leave to intervene and vacate the judgment

of the court below (Pet., App. A, p. 19) is reported. The order and administrative determination of compliance status (Pet., App. C, p. 44; R. 183-185), issued August 6, 1953, is not reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (hereinafter referred to as the "Board") (Pet., App. C, pp. 38-43; R. 276-280, 218-225) are reported at 111 NLRB 369 (1955).

JURISDICTION.

The judgment of the court below (Pet., App. A, p. 20) was entered on June 15, 1956. The order of the court below denying petitioners' motion for leave to intervene (Pet., App. A, p. 19) was entered on April 6, 1956. The Petition for Writ of Certiorari was filed on July 5, 1956. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Sections 10(e) and 10(f) of the National Labor Relations Act, as amended (hereinafter referred to as "NLRA").

QUESTIONS PRESENTED.

1. Whether the court below erred in denying petitioners' application for leave to intervene for the purpose of filing a motion to vacate the judgment of the court below in a case where they had not sought to intervene prior to judgment.

*2. Whether Section 9(h) of the NLRA may constitutionally be applied to require all officials of a union holding positions identified as offices in its constitution to file non-Communist affidavits as a condition precedent to the union's use of the processes of the Board.

*3. Whether the court below erred in holding that the Board must construe the entire constitution of a union to determine which officials hold positions "identified as

offices" within the meaning of Section 102.13(b)(3) of the Board's Rules and Regulations.

*4. Whether the court below erred in failing to remand this cause to the Board for hearing to take additional evidence as to whether certain officials of the union were "officers" within the meaning of Section 9(h) of the NLRA, where uncontradicted documentary evidence in the record enables the court to make such determination as a matter of law.

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS INVOLVED.

The pertinent provisions of the Constitution of the United States are set forth in the Petition, p. 3, and the applicable provisions of the NLRA (61 Stat. 136, 29 U. S. C. 151 *et seq.*) and of the Board's Rules and Regulations are set forth in Appendix D to the Petition (p. 47).

STATEMENT.

This respondent, Goodman Manufacturing Company, accepts the statement of the case set forth on pages 3 through 6 of the Brief for the Board in Opposition.

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* Questions 2 through 4 are addressed to the importance of the decision below. The respondent supports the position of the Board that these questions are properly before this Court only if the court below erred in denying petitioners' motion for leave to intervene. Questions 2 through 4 are discussed herein for the sole purpose of assisting the Court in disposing of all matters arising out of the Petition with as little delay as practicable if it determines that the Court below erred in denying petitioners' application for leave to intervene.

ARGUMENT.

I.

Petitioners' Motion for Leave to Intervene in the Proceedings Before It Was Properly Denied by the Court of Appeals.

The petitioners did not attempt to intervene in the proceedings below until after the original judgment was entered on November 10, 1955. Thereafter, within the time permitted for the filing of a motion for rehearing it filed a motion for leave to intervene and to file a motion for rehearing, even though it was acquainted with the progress of the proceedings at all times prior to that date (Affidavit of Edward S. Stern, Objections to Motion for Leave to Intervene, p. 8).* Subsequently, after this Court had decided *National Labor Relations Board* v. *Coca Cola Bottling Co. of Louisville*, 350 U. S. 264 (1956), the Board filed a motion to vacate the original judgment of the court below and to reinstate the case for further consideration. The petitioners moved for leave to intervene and to support the Board's motion. The Board and this respondent opposed such intervention. The motion was denied but the petitioners were given leave to appear as *amicus curiae*, to file a brief and to participate in the oral argument (Pet., App. A, p. 19) which they subsequently did.

As is fully argued in the Board's Brief in Opposition filed herein, Section 10(f) of the NLRA does not give a party which is not aggrieved by an order of the Board a right to participate in proceedings before a Court of Appeals (Board Brief, pp. 6-9). The Board, in seeking to

* The denial of this first motion for leave to intervene is not at issue in these proceedings.

enforce an order or in defending an order from attack by an aggrieved party, is acting in a public capacity (*National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362 (1939)). Orders of the Board in unfair labor practice proceedings under Section 8 of the NLRA do not give either employers or unions private rights which may be enforced by them in the Courts of Appeals (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 270 (1939)). Respondent adopts and supports the argument of the Board contained on pages 6 through 9 of its Brief in the same manner as though respondent had included said argument herein in full.

All the matters set forth below in this section I of the respondent's argument in opposition to the Petition are presented to the Court as matters supplemental to the argument set forth by the Board in its Brief.

The granting of a petition of a third party for leave to intervene in litigation is entirely discretionary with a court when a statute does not grant the party the right to intervene as of right, and a reviewing court will not review the decision of the lower court unless there has been an abuse of discretion. Contrary to the statement of the petitioners (Pet., pp. 16-17), there is no conflict between the decisions of the various Courts of Appeals on the question of whether a non-aggrieved party may intervene in cases before them arising out of petitions for review or petitions for enforcement of Board orders. The Court of Appeals for the Seventh Circuit has exercised its discretion in favor of intervention by both employers and unions in such recent cases as *Kovach* v. *N. L. R. B.*, 229 F. 2d 138 (CA 7, 1956); *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO* v. *N. L. R. B.*, 231 F. 2d 237 (CA 7, 1956); *Chauffeurs, Teamsters and Helpers General Local #200, AFL* v. *N. L. R. B.*, 233 F. 2d 233 (CA 7, 1956). On the other hand

the Court of Appeals for the Seventh Circuit is not the only Court of Appeals which has denied intervention. One of the leading cases on the point is *Haleston Drug Stores, Inc.* v. *N. L. R. B.*, 190 F. 2d 1022 (CA 9, 1950). In the *Haleston* case, the Board dismissed a charge filed by Haleston against certain labor unions. Pursuant to Section 10(f) of the NLRA, Haleston filed a petition for review of the dismissal and the unions named in the charge moved to intervene as defendants in the appeal. The court refused to allow intervention even though both the petitioner and the Board had waived objections thereto.

This Court should not grant certiorari unless it feels that the court below clearly abused its discretion in denying petitioners' motion for leave to intervene.

There is no question but that the rights of the local union, one of the petitioners, as the charging party in these proceedings, were fully and properly represented (*New York* v. *New York Telephone Company*, 261 U. S. 312, 316 (1922)) by the Board before the court below. The Board, in addition to answering the petition of this respondent to review and set aside its order, requested enforcement of the order, filed a brief of forty-two (42) pages in support thereof and subsequently argued the issues orally before the Court of Appeals. Following the opinion of this Court in the *Coca Cola* case, the Board moved to vacate the original judgment entered by the court below and upon vacation of that judgment (Pet., App. A, p. 19), filed a brief and argued orally for a second time in support of its original order. It should be noted that at no time prior to the entry of the original judgment by the Court of Appeals did the petitioner seek to intervene. It is obvious that up until that time it was satisfied that its interests were adequately represented. It attempted to intervene only after the Court of Appeals had entered a judg-

ment denying enforcement of the Board's order, which had been in its favor.

In *Caldwell* v. *Guardian Trust Co.*, 26 F. 2d 218 (CCA 8, 1928), a third party attempted to move to set aside the judgment theretofore entered and to interpose an answer setting up alleged defenses to the original complaint. The petition was filed after judgment had been entered. The Circuit Court of Appeals held that intervention should be denied even though the person may have had an interest in the property which was the subject of the suit and might have intervened prior to judgment. The court stated (at p. 222):

> "But the right of intervention is one which must be exercised promptly. The application may properly be denied, when not made until after judgment has been rendered. 11 Encyc. Pl. & Pr. 503; *Owens* v. *Colgan*, 97 Cal. 454, 32 P. 519; *Laugenour* v. *Shanklin*, 57 Cal. 70; *Henry, Lee & Co.* v. *Cass Co., etc., Co.*, 42 Iowa, 33; *Leon First Nat. Bank* v. *Gill & Co.*, 50 Iowa, 425; *Henderson* v. *Farmers', etc. Bank*, 199 Iowa, 1156, 200 N. W. 581; *Meadows* v. *Goff*, 90 Ky. 540, 14 S. W. 535; *Hicklin* v. *Neb. City Nat. Bank*, 8 Neb. 463, 467, 1 N. W. 135; *Porter* v. *Knapp*, 37 S. D. 279, 157 N. W. 988; *Youngberg* v. *Youngberg*, 44 S. D. 1, 181 N. W. 835. See *State* v. *Farmers' State Bank*, 103 Neb. 194, 170 N. W. 901.
>
> "Even in equity it is unusual to grant leave to intervene after final decree. 21 C. J. § 346, p. 345; *Engdahl* v. *Laverty*, 110 Neb. 672, 194 N. W. 862."

Thus, the Court should review the order denying the petitioners leave to intervene only if it believes that the court below abused its discretion in denying the motion made after judgment. Two important factors which the Court should consider in determining whether the court below did abuse its discretion are (1) the adequate representation by the Board of the petitioners' interest in the

proceedings below, and (2) the fact that the petitioners did not seek to intervene at any time prior to the judgment indicating clearly that it was the judgment and not the quality of their representation by the Board with which they were dissatisfied.

II.

Neither Congress Nor the Board Have Attempted to Classify Those Officers Who Must Comply With Section 9(h) of the Act.

The petitioners contend that the decision below results in a violation of the First Amendment to the Constitution of the United States in that it denies political freedom to members of unions to choose officers and restricts the freedom of union officers to choose their political beliefs. They contend that *American Communications Association* v. *Douds,* 339 U. S. 382 (1949), which case held Section 9(h) of the NLRA constitutional, did so only insofar as that section applies to officers of unions who have the power to call strikes (Pet., pp. 8-9). They argue that because the Trustees' duties lie primarily in safeguarding union finances and supervising the procedure for the recall of officers, they should not be required to comply with Section 9(h). In other words, the petitioners imply that the *Douds* case compels the Board to classify the officers of a union according to their ability to call political strikes in determining which officers should comply with Section 9(h) of the Act. There is no indication in the Congressional Record (93 Cong. Rec. 3577, 5095, 6438, 6537-38, 6602, 6604, 6612, 6656, 6664, 7002, 7503) or in the reports of the committees of Congress (H. Rep. No. 245, 80th Cong., 1st Sess., pp. 38-9, 89; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49) which considered the Taft-Hartley Amendments to the NLRA, that Congress ever intended to so classify officers of a union. Certainly in the *Douds* case

neither Chief Justice Vinson, who wrote the majority opinion, nor Justices Frankfurter or Jackson, who wrote concurring opinions, attempted to make the classification. It is true that the majority opinion contains a considerable number of references to the power of officers of a union who may call political strikes (Pet., p. 9). It is also true, and the petitioners do not mention this fact in the Petition, that the opinions of this Court in the *Douds* case refer to other reasons why the Congress may require officers of unions to file non-Communist affidavits. For instance, Chief Justice Vinson stated (at p. 392):

> "* * * Political affiliations of the kind here involved no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by § 9(h) would be subject to 'tempting opportunities' to commit acts deemed harmful to the national economy. In this respect § 9(h) is not unlike a host of other statutes which prohibit specified groups of persons from *holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.*" (Emphasis ours.)

and at p. 402, Chief Justice Vinson stated:

> "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,' *the public interest in the good faith exercise of that power is very great.*" (Emphasis ours.)

It is significant that Justice Frankfurter in his concurring opinion did not even mention the power to call political strikes as an important reason for the regulation

of union officers under Section 9 (h). He stated that one of the reasons for such regulation is "to keep Communists out of controlling positions in labor unions as a condition to utilize the opportunities afforded by" the NLRA (p. 416). At p. 418, he set forth another reason:

> "Congress was concerned with what it justifiably deemed to be the disorganizing purposes of Communists who hold *positions of official power in labor unions,* or, at the least, what it might well deem their lack of disinterested devotion to the basic tenets of the American trade union movement because of a higher loyalty to a potentially conflicting cause. * * *" (Emphasis ours.)

Although it is unquestionably true that one reason why Congress adopted Section 9(h) was to require non-Communist affidavits from those officers who had the power to call political strikes, this is only one reason; and it is also true that Congress was at the same time deeply concerned with the fiduciary nature of the positions of officers of unions and was particularly concerned with their relationship to the rank and file members of the unions. Section 9(g) of the Act requires unions to file financial information with the Secretary of Labor and to distribute such information to its members annually. In holding this section constitutional, a three-judge court sitting in the District Court for the District of Columbia held that where a private citizen engages in union activities "rights which are guaranteed by the Constitution to a private citizen do not prevent the government from determining their fitness to be fiduciaries or from restricting their actions as such." (*National Maritime Union of America* v. *Herzog,* 78 Fed. Supp. 146, 173 (D. C., 1948), aff'd., 334 U. S. 854 (1948).)

The petitioners admit that the Trustees are primarily concerned with the safekeeping of union finances (Pet., p.

9). They, therefore, are concerned with the making of financial reports which are issued to the members of the union. Hence there would seem to be no question that, being fiduciaries and subject to government regulation in the public interest, they could be required constitutionally to file non-Communist affidavits. It is reasonable to assume that Communists, if in charge of safekeeping of union finances, might well, for their own ends, prepare misleading reports, thus deceiving the rank and file members of the union and the Secretary of Labor, who might never learn the actual state of the union finances, if it served the Communists' own ends to mislead them.

Therefore, even if the Court believes that petitioners should be permitted to intervene below, it nevertheless must agree with the Court of Appeals decision holding that the *Douds* case requires all officers of a union to comply with Section 9(h) of the NLRA. It is significant that the petitioners do not argue that under the *Douds* case District Secretaries of the International Union should be excluded from the class of officers required to file affidavits. They attempt to find another reason why the Court of Appeals decision as to the District Secretaries is erroneous (See section IV below), since it could not argue on any ground whatsoever that all members of the General Executive Board of the International Union, of which board the District Secretaries are members (Pet., App. E, p. 49), do not have such power and control of union activities that even under their own limited interpretation of the *Douds* case they may be required to file non-Communist affidavits in accordance with the provisions of Section 9(h).

III.

The Court of Appeals Correctly Determined That the Trustees and District Secretaries Are Officers Within the Meaning of Section 9(h) of the National Labor Relations Act and Section 102.13(b)(3) of the Board's Rules and Regulations.

Section 102.13(b)(3) of the Board's Rules and Regulations provides that "the term 'officer' shall mean any person occupying a position identified as an office in the Constitution of the labor organization." In interpreting this regulation and determining that the International Union did not comply with Section 9(h) of the NLRA, the court below applied the customary rule of construction that the meaning of an instrument cannot be determined merely by reference to one isolated clause, but must be determined by reading the document as a whole and its several provisions in relation to one another. When the document is ambiguous, resort must be had to such other evidence as clarifies the intent of the draftsmen or the interpretation given the document by those primarily concerned. Thus, the court's holding that the Trustees and District Secretaries are officers within the meaning of Section 9(h) was based not only on the list of officers in the first paragraph of Article 5, Section A of the International Union constitution (Pet. App. E, p. 49), but also on the other provisions of the constitution which enumerate the union's officials, their duties and their manner of selection (Pet., App. B, pp. 33-35). In discussing the status of the Trustees, the court below also took into account various statements of union officials contained in other documents, for the purpose of further clarifying the ambiguities it found inherent in the constitution (Pet., App. B, pp. 35-36).

At no time did the court below purport to adopt the purely "functional test" rejected by this Court in *N. L. R. B.*

v. *Coca Cola Bottling Co. of Louisville,* 350 U. S. 264 (1956), *i. e.* that a union's officers may be determined solely by examining their activities on behalf of the union and without specific regard to the provisions of its constitution. On the contrary, the International Union's constitution was the basis for both decisions of the court below, and on reconsidering its original decision, it ordered the filing of additional briefs and the presentation of additional oral argument on the question of the impact of the *Coca Cola* decision on its first decision in this case (Pet., App. B., pp. 22-29). Further, the court below did not deny the validity of Section 102.13 (b)(3) of the Board's Rules and Regulations, as had the lower court in the *Coca Cola* case (219 F. 2d 441 (CA 6, 1955)). Rather, the court below differed with the Board only on the result reached by applying that regulation to the International Union's constitution using the customary rules of documentary construction. Actually it is petitioners who now by their argument in the Petition violate the rule of the *Coca Cola* case by attempting to employ the "functional test."

The consequence of the decision of the court below is simply that in applying Section 102.13(b)(3) of its Rules and Regulations the Board must now read the whole of each union constitution and, where an ambiguity is present take note of such other facts as may clarify the ambiguity. Apparently, the Board is willing to abide by the decision of the Court of Appeals for it has decided not to request the Solicitor General to file a petition for certiorari on its behalf (Board Brief, p. 6). This should be an adequate answer to the arguments of the petitioners (Pet., pp. 10-14) which relate to the administrative significance of the case. Clearly, in determining whether to

grant certiorari in this case, this Court should accord substantial weight to the decision of the agency primarily charged with the administration of the NLRA not to petition for certiorari itself. That agency's request that this petition for certiorari be denied should be persuasive on the Court.

IV.

Petitioners Were Not Denied Due Process of Law by Reason of the Failure of the Court of Appeals to Remand the Case to the Board for the Purpose of Taking Evidence Relative to the District Secretaries.

In the proceedings before the Board this respondent on March 4, 1953, filed a motion to re-determine compliance status and to dismiss complaint (R. 112-129). This motion alleged in substance that the failure of Trustees and District Secretaries to file non-Communist affidavits was fatal to the jurisdiction of the Board. The Board's notice to show cause, dated June 24, 1953, made no reference to the District Secretaries, but only to the Trustees, because, as is indicated in a footnote to the Board's order of August 6, 1953 (R. 183) denying the motion, the Board had previously determined in *Sunbeam Corp.*, 98 NLRB 525 (1952), that the District Secretaries are not officers of the International Union. Hence, the petitioners won a complete victory before the Board on the issue of the compliance of the District Secretaries of the International Union by virtue of an investigation of the secretaries' duties in an earlier proceeding. The petitioner now urges (Pet., pp. 9-11) that it was denied due process of law because the District Secretaries were found to be "officers" without a hearing having been held on the issue before the Board. The petitioners' phraseology has obscured its legal argument, which apparently is that the Court of Appeals

should have remanded the case to the Board for the taking of evidence on the duties of the District Secretaries and "the whole treatment of those positions in the Union structure and history * * *" (Pet., p. 10).

Undoubtedly, the court below had the inherent power to remand the case for additional findings of fact (*Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373 (1939)), but it was not necessary that it do so (*N. L. R. B.* v. *National Motor Bearing Company*, 105 F. 2d 652 (CCA 9, 1939)). This is true, not only because of the commonly accepted rule that a Court of Appeals need not remand for findings of fact where all the necessary facts can be determined from wholly documentary evidence in the record (*Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *McComb* v. *Utica Knitting Company*, 164 F. 2d 670 (CCA 2, 1947)), but particularly because the rule announced by this Court in the *Coca Cola* case and followed by the court below is one under which the question of the necessity of compliance by District Secretaries can be determined by reference solely to the union constitution. This document clearly identifies the District Secretaries as members of the General Executive Board (Article 5, Section A, Pet. App. E, p. 49) and gives that Board the power to control union activities (Art. 10, R. 146-149). No remand for the making of additional findings of fact was required because the constitution alone clearly set forth the nature of the duties of the District Secretaries.

In the *Curtis Publishing Company* case, this Court reversed a decision of the Federal Trade Commission which had held the respondent there in violation of Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act. No remand for additional findings was deemed necessary, because the Court had before it the contract which had formed the basis for the Commission's ruling.

The Court stated (at p. 580):

> "If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be, remanded to the commission,—the primary fact-finding body,—with direction to make additional findings; but if, from all the circumstances, it clearly appears that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute so to do."

It should be noted that provisions of Section 10(e) of the NLRA dealing with the reviewing power of the Court of Appeals follow closely the language of Section 5 of the Federal Trade Commission Act, under which the *Curtis Publishing Co.* case was decided.* Again, the court below in the instant case has followed a wholly conventional rule and has raised no issue which this Court need review. This rule was stated by it in a case not arising under the NLRA as follows (*Smith* v. *Dravo Corp.*, 208 F. 2d 388, 391 (CA 7, 1953)):

> "* * * Ordinarily, as to issues upon which no findings have been made, the court will reverse with directions to make findings and conclusions, but in equity, where the record is complete or the evidence uncontradicted or entirely documentary, the appellate court is bound to decide the case, so far as it is in

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* Section 5 of the Federal Trade Commission Act provided in part as follows (at the time of the decision, 260 U. S. 568 at p. 573n):

> "* * * the court * * * shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission * * *."

Section 10(e) of the National Labor Relations Act, 29 U. S. C. § 160(e), provides in part as follows:

> "* * * the court * * * shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *."

> condition to be decided, and direct such a decree as under all circumstances may be proper. * * *"

Under *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373 (1939), the reviewing court has equity powers in reviewing Board decisions (305 U. S. at p. 373).

The petitioners contend that they have been prejudiced by their lack of opportunity to introduce evidence of the activities of the District Secretaries, wholly ignoring the fact that there is no need, as a practical matter, to go beyond the provisions of the constitution to determine that the District Secretaries are officers. This contention is somewhat baffling in the light of petitioners' argument that no evidence is relevant except the initial listing of officers in the first paragraph of Article 5, Section A, of the constitution of the International Union (Pet., App. E, p. 49). The evidence which the petitioners have professed a desire to introduce would be relevant if the Court of Appeals in the instant case had chosen to follow the "functional test" rejected by this Court in the *Coca Cola* case or if it had determined that there was some ambiguity not clarified in the record as to whether secretaries are "officers." The provisions of the International Union's constitution on this point are clear and unequivocal. Therefore, a further hearing before the Board could serve no reasonable purpose.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 19, 1956.

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National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

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MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 24 9
Moore's *Federal Practice* (2d Ed.), Vol. 4, p. 99 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 233

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), AND LOCAL 1114 UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), *Petitioners*

v.

GOODMAN MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The first opinion of the court below (Pet. App. B) is reported at 227 F. 2d 465; its second opinion (Pet. App. B) is not yet officially reported. The order of the court below denying petitioners' motion for leave to intervene in the enforcement proceeding (Pet. App.

A, p. 19) is not reported. The findings of fact, conclusions of law and order of the Board (Pet. App. C, R. 276-280, 218-224) are reported at 111 NLRB 369.

JURISDICTION

The judgment of the court below (Pet. App. A, p. 20) was entered on June 15, 1956. The order of the court below denying petitioners' motion for leave to intervene (Pet. App. A, p. 19) was entered on April 6, 1956. The petition for a writ of certiorari was filed on July 5, 1956. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court below erred in denying petitioners' application for leave to intervene for the purpose of filing a motion to vacate the judgment of the court below.[1]

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) and the Board's Rules and Regulations are set forth in Appendix D to the petition.

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[1] Petitioners' questions Nos. 1, 2 and 3, which are addressed to the validity of the decision below on the merits, are properly before this Court on this petition only if the court below erred in denying petitioners' application for leave to intervene. Since, as we show in the Argument, *infra*, the denial of the application was clearly proper, we do not believe it necessary to go into these questions in this brief.

STATEMENT

As set forth in the petition, this case arises out of an unfair labor practice proceeding conducted before the National Labor Relations Board pursuant to Section 10 of the National Labor Relations Act. Upon charges duly filed and served, the Board's General Counsel issued a complaint alleging that Goodman Manufacturing Company (hereinafter called the Company) had refused to bargain with petitioner International, the certified bargaining representative of the Company's employees, in violation of Section 8 (a) (5) of the Act (R. 221; 106-112, 196-197).[2] A hearing on the complaint followed at which petitioners were represented by counsel (R. 218; 186). Before the Board, the Company defended its refusal to bargain on the ground, *inter alia*, that the representation proceedings which culminated in the certification of the International were invalid because the International was not in compliance with the filing requirements of Section 9 (h) of the Act at that time. This defense was grounded on the claim that the Trustees and District Secretaries of the International were officers within the meaning of Section 9 (h) but had not filed the required non-Communist affidavits (R. 221-222; 112-132, 186-210).

Thereafter the Board instituted a separate administrative proceeding to determine the International's compliance status (R. 221, 276; 133-134). In connection therewith the Board issued and served on all

[2] The charges were filed by Local 1150, an affiliate of the International (R. 106). Petitioner Local 1114 is the successor to Local 1150.

parties a Notice to Show Cause directing the International to show cause why the Trustees were not officers and why it should not be administratively determined that the International was not in compliance with Section 9 (h) because of their failure to file non-Communist affidavits (*ibid.*). Having already determined in a prior administrative proceeding that the District Secretaries were not officers of the International (*Sunbeam Corp.*, 98 NLRB 525), the Board did not require the Union to show cause with respect to them.

After considering the International's answer to the Notice to Show Cause together with the Company's reply thereto (R. 174-181), the Board, on August 6, 1953, issued an "Order and Administrative Determination of Compliance Status" in which it found that, under the test employed by the Board for determining the "officers" subject to the filing requirements of Section 9 (h), the Trustees and District Secretaries were not officers within the purview of that Section and that the International was in full compliance (R. 221; 133-185). Accordingly, the Board found that in refusing to bargain with the Union the Company violated Section 8 (a) (5) of the Act (R. 277-278, 220-222).

Upon the Company's petition for review and the Board's cross-petition for enforcement of the remedial order, the court below, without passing on the merits of the Board's unfair labor practice findings, set aside the Board's order (Pet. App. B, pp. 22-29). In its opinion issued November 10, 1955, the court, disapproving of the test employed by the Board for

determining the persons subject to the non-Communist affidavit filing requirements, held that the Trustees and District Secretaries were "officers" within the scope of Section 9 (h) and, therefore, that the International was not in compliance with Section 9 (h) of the Act (*ibid.*).

Thereafter, on or about November 28, 1955, petitioners filed a motion with the court below requesting leave to intervene for the purpose of submitting a petition for rehearing. On December 19, 1955, the court below denied the motion (Pet. App. A, p. 21).

Following the decision of this Court on February 27, 1956, in *National Labor Relations Board* v. *Coca-Cola Bottling Co. of Louisville, Inc.*, 350 U.S. 264, upholding the test applied by the Board for determining the persons subject to the filing requirements of Section 9(h) of the Act, the Board, on or about March 2, 1956, filed a motion with the court below to vacate its prior judgment in the instant case and to restore the case to the docket for further proceedings. Petitioners, on March 8, 1956, again moved to intervene, this time in support of the Board's motion. The Board opposed the motion to intervene. On April 6, 1956, the court below issued an order vacating its prior judgment and setting the case on the docket for further consideration (Pet. App. A, p. 19). At the same time the court below denied the Union's motion to intervene but "without prejudice to its right to appear as *amicus curiae,* file brief and participate in any oral argument" (*ibid.*). Thereafter petitioners filed a brief *amicus curiae* and participated in the oral argument.

In its second decision handed down June 15, 1956, the court below concluded that this Court's *Coca-Cola* decision did not "impair the result" reached by it in its earlier November 1955 opinion and then reaffirmed its previous holding that the International was not in compliance with Section 9(h) of the Act (Pet. App. B, pp. 30-37). The court below found that both the Trustees and the District Secretaries were "officers" under the Board's own test as viewed and approved by this Court in the *Coca-Cola* case. Accordingly, the court below held that the failure of these individuals to file the non-Communist affidavits vitiated the proceedings before the Board, and the court again denied enforcement of the Board's order. The Board has determined not to request the Solicitor General to file a petition for certiorari.

ARGUMENT

Petitioners' standing to seek review of the decision below on the merits turns on whether they were parties, or at least intervenors, in the court proceeding below. 28 U.S.C. Sec. 1254. See *International Union* v. *Eagle-Picher Co.*, 325 U.S. 335, 338-339. Although petitioners filed the charges initiating these proceedings, they were not parties in fact or in name, "the controversy * * * [having been] between the Federal government on one hand, represented by the Board, and the respondent-employer on the other hand." *National Labor Relations Board* v. *General Motors*

Corp., 116 F. 2d 306, 312 (C.A. 7). A charge is necessary to set Board proceedings in motion, but "the person or group making the charges does not become the actor in the proceeding." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265. The proceeding "is not for the adjudication of private rights * * *. The Board acts in a public capacity to give effect to the declared public policy of the Act." *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362. Moreover, after the Board order has issued, "the court has no jurisdiction to enforce the order at the suit of any private person or group of persons." *Amalgamated Utility Workers, supra*, at p. 272. This is because it is "the Board's order on behalf of the public that the court enforces * * * The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'." *Id.* at p. 269. Accordingly, unless the court below improperly denied the Union's motion to leave to intervene, the Union is without standing to seek review of the decision below on the merits.[3]

It is clear that unless a statute provides otherwise, petitions of third parties to intervene in pending litigation are generally left to the discretion of the

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[3] The situation here, where a charging party seeks to intervene to support a Board determination, is to be distinguished from the situation where a charging party or other person adversely affected by a Board order seeks to contest and review a Board order. In such cases the charging party has standing to obtain review as a "person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought." Section 10(f) of the Act; *Amalgamated Utility Workers* v. *Consolidated Edison*, 309 U.S. 261, 266.

court of first instance. *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U.S 502, 506. The National Labor Relations Act does not confer upon charging parties the right to intervene in Board proceedings. The considerations which underlie the proposition that a charging party is not a party to Board enforcement proceedings also lead to the conclusion that a charging party has no standing to intervene in such proceedings as a matter of right for purposes of supporting a Board order, as here. As stated in *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 488 (C.A. 7):

> The union has asked leave to intervene. This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself of helpful suggestions.

"The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown." *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137, 142. Cf. *Missouri-Kansas Pipe Line Co., supra,* 312 U.S. at 506. The denial by the court below of the petitioners' March 8, 1956, application to intervene, as well as its earlier November 28, 1955, application, was neither arbitrary nor an abuse of discretion. It is well settled that "Intervention after judgment is unusual and not often

granted," even where intervention is of right. Moore's *Federal Practice* (2d Ed.), Vol. 4, p. 99.[4]

Neither *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765 (C.A.D.C.) certiorari denied, 351 U.S. 909, nor *Wolpe* v. *Poretsky*, 144 F. 2d 505 (C.A.D.C.), cited by petitioners, is in conflict with the ruling below. The differing results in those cases, as is evident from a reading of the opinons, turn largely upon the particular statutory provisions involved; they do not purport to rest on a repudiation of the general rule, followed here, that in situations "dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest * * * the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court." *Missouri-Kansas Pipe Line Co., supra*, 312 U.S. at p. 506.

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[4] See also *United States* v. *California Canneries*, 279 U.S. 553, 556; *Smith* v. *Gale*, 144 U.S. 509, 520; *Stallings* v. *Conn*, 74 F. 2d 189, 191 (C.A. 5); *Caldwell* v. *Guardian Trust Co.*, 26 F. 2d 218, 222 (C.A. 8); *Tennessee Coal, I. & R. Co.* v. *Muscada Local 123*, 5 FRD 174, 177 (N.D. Ala.); *Union Nat. Bank* v. *Superior Steel Corp.*, 9 FRD 124, 127 (W.D. Pa.). Cf. Rule 24 of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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